Dispute Resolution

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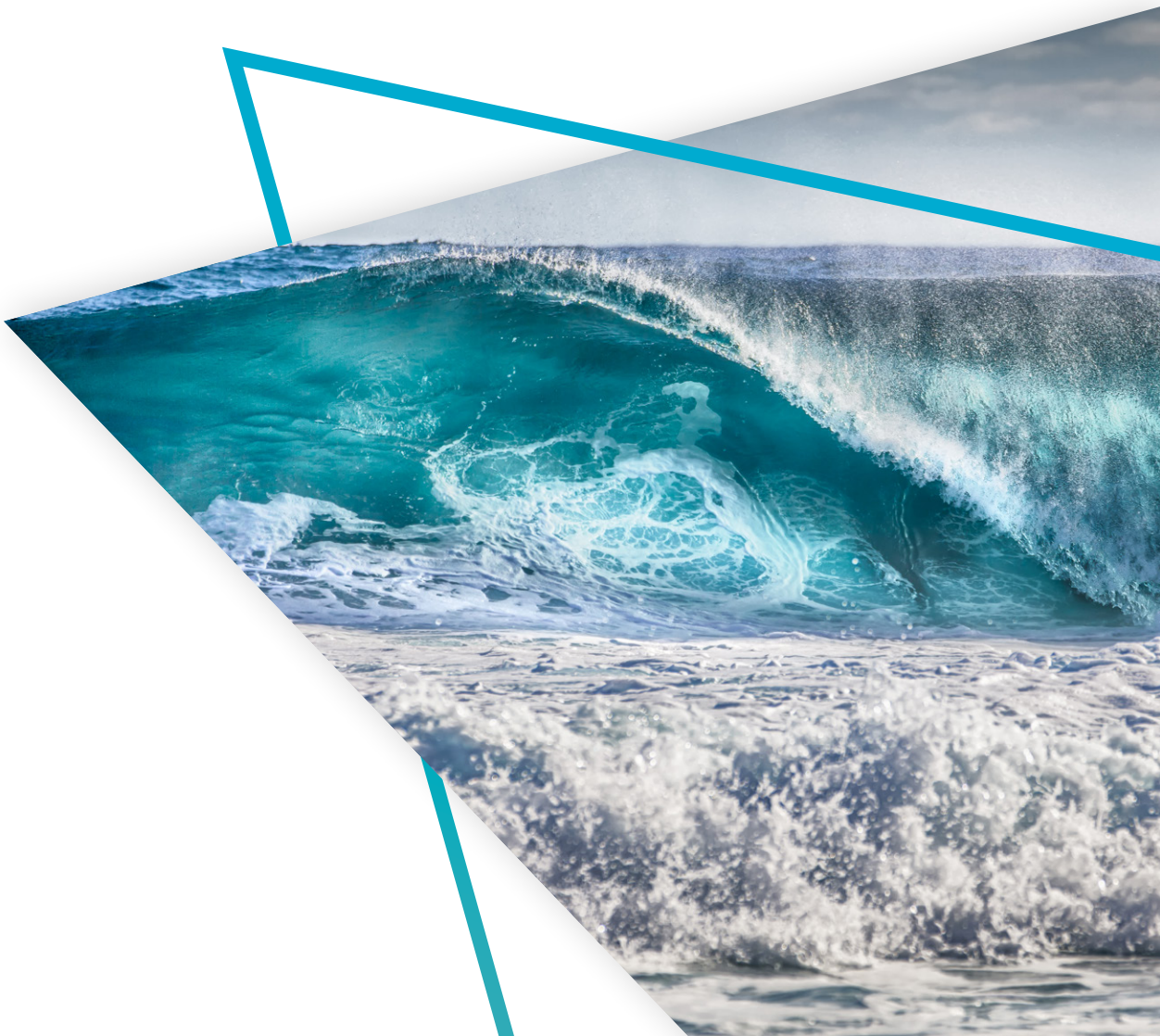

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SOUTH AFRICA

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DISPUTE RESOLUTION ALERT

Courts are unlikely to grant relief where hardship results from a party's own inaction

In this alert, we look at the Supreme Court of Appeal's (SCA) decision in *Kidrogen RF (Pty) Ltd v Erasmus* and Others, which reminds us that the courts are unlikely to grant relief where hardship results from a party's own inaction or failure to comply with agreed timelines.

Background

The dispute relates to share sale agreements (the agreements) between Kidrogen RF (Pty) Ltd (Kidrogen) and two taxi operators (the sellers), which included an arbitration clause requiring disputes over a portion of shares (the disputed shares) to be referred to arbitration for resolution within 30 days of the date of signature of the agreements. Importantly, Clause 9.2 of the agreements recorded that should Kidrogen:

> *"[F]ail to pursue arbitration within 30 days of signature, the failure shall be deemed to be a determination in favour of the seller and the portion of the purchase price together with the interest thereon held by attorneys shall be paid to the seller."*

When Kidrogen failed to initiate arbitration within the agreed 30-day window, the arbitrator ruled in favour of the sellers in terms of Clause 9.2.

Following the arbitration award in favour of the sellers, Kidrogen approached the High Court and sought to extend the time for commencing arbitration from 30 days to six months in terms of section 8 of the Arbitration Act 42 of 1965 (Arbitration Act), which allows courts to extend time-bars in arbitration agreements to prevent undue hardship.

The High Court refused the extension, holding that section 8 applies only to *"future disputes"* and cannot be used to override the finality of an arbitral award. Importantly, the High Court found that Kidrogen had not demonstrated undue hardship.

Kidrogen then appealed the High Court's decision to the SCA, raising the following legal issues:

- **The applicability of section 8 of the Arbitration Act:** Whether section 8, which allows a court to extend the time for commencing arbitration proceedings in cases of undue hardship, applies to disputes that have already arisen and been subject to an arbitral award.
- **The interpretation of section 8:** The proper approach to interpreting section 8, considering its purpose and the context within the Arbitration Act.
- **Undue hardship:** Whether Kidrogen demonstrated undue hardship warranting the extension of the arbitration period.

Conflicting precedents and the SCA's approach

The SCA acknowledged conflicting High Court decisions on whether section 8 relief can be granted after a final arbitral award. One line of authority, *Genet v Van der Merwe N O* found that section 8 does not give the courts power to extend the time-bar after an arbitrator has made an award upholding a time-bar defence. The court there had regard to the final and binding effect of arbitration awards provided in section 28 of the Arbitration Act. It reasoned that if the legislature intended for section 8 to reverse the final and binding effect of a time-bar award, it would have been expressly stated so in section 8, or elsewhere in the Arbitration Act.

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Another line of authority, *King Civil v Enviroserve Waste Management* suggested that courts could extend time-bars by amending the arbitration agreement, even post-award. The court in *King Civil* reasoned that, in granting an extension in terms of section 8, a court would not be interfering with the award of the arbitrator but would merely be amending the arbitration agreement. So that, at the *"continuation of the arbitration proceedings on the merits"*, the arbitrator would merely be presented with an amended arbitration agreement. The court reasoned that an application in terms of section 8 *"constitutes an entirely separate procedure"* which is, it said, something Genet did not appreciate.

The SCA's findings on appeal

- **Applicability of section 8:** The SCA held that section 8 applies only to future disputes and not to disputes that have already arisen and been subject to an arbitral award. The SCA emphasised that Kidrogen had agreed to the time-bar provision in the arbitration agreements and had ample opportunity to seek an extension before the arbitration commenced. By failing to do so, Kidrogen's hardship was self-created.
- **Interpretation of section 8:** The SCA reaffirmed the principles of statutory interpretation, emphasising the need to consider the text, context and purpose of the provision. It noted that section 8 was intended to address undue hardship caused by restrictive time-bars in arbitration agreements. However, the SCA found that the section did not apply to disputes that had already been determined by an arbitral award.
- **Undue hardship:** The SCA found that the Kidrogen's delay in seeking an extension was self-created and not justified and it had not shown that the hardship was disproportionate to its own fault in the matter. Further, the company had ample opportunity to apply for an extension before the arbitration commenced but failed to do so.

Practical implications

The SCA's decision provides important guidance on the finality of arbitral awards and the limited circumstances under which courts may extend time-bars for commencing arbitration proceedings. Once an arbitral award is issued, it is final and binding, and courts have very limited power to intervene. Section 8 of the Arbitration Act applies only to future disputes and cannot be used to extend time after a final award has been made.

This decision underscores the importance of careful contract management and timely action in arbitration matters. A party wishing to make an application for extension of time under an arbitration agreement should ensure that it is made promptly as delay may be fatal to their case.

A reminder that *"you cannot outrun a storm that you have created with your own hands"*.

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